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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EXXON CORPORATION, THE BFGOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY and TENNECO CHEMICALS, INC.,

Petitioners,

vs.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of Environmental Protection, and THE STATE OF NEW JERSEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN J. CARLIN, JR.,
Counsel of Record for Petitioners,
LISA J. POLLAK,

FARRELL, CURTIS, CARLIN & DAVIDSON,
Attorneys for Petitioners, Exxon Corporation, The BFGoodrich Company, Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc.,

43 Maple Avenue,
P.O. Box 145,
Morristown, New Jersey 07960
(201) 267-8130

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

QUESTIONS PRESENTED

Does plaintiffs' complaint, which seeks to secure the enforcement of a right specifically granted to them under the federal Superfund Act, and the merits of which depend on the construction of §114(c) of that federal statute, state a cause of action arising under federal law?

Does §113(b) of the federal Superfund Act, vesting the United States District Courts with exclusive jurisdiction over controversies arising under Superfund, deprive the state courts of jurisdiction over plaintiffs' complaint and thereby render the Tax Injunction Act inapplicable?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EXXON CORPORATION, THE BFGOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY and TENNECO CHEMICALS, INC.,

Petitioners,

vs.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of Environmental Protection, and THE STATE OF NEW JERSEY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Petitioners, Exxon Corporation, the BFGoodrich Company, Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 30, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 683 F.2d 69 (3rd Cir. 1982). The Opinion of the District Court for the District of New Jersey is unreported. A copy of the transcript of that Court's Oral Opinion is annexed to this Petition as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on June 30, 1982 and a copy thereof is appended to this Petition as Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 9613.

CIVIL PROCEEDINGS

(a) Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Except as provided in subsection (a) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies

arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment or collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

(d) No provision of this Act shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

42 U.S.C. §9614(c)

RELATIONSHIP TO OTHER LAW

. . .

(c) Except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

. . .

28 U.S.C. §1341

Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932.

United States Constitution, Article VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

N.J.S. 58:10-23.11h

[Text is set forth in Appendix F.]

STATEMENT OF THE CASE

There has developed, in recent years, an increasing awareness of and concern over the damage caused by the release of hazardous substances into the environment. The need for a national approach to this problem culminated, on December 11, 1980, in the enactment of "Superfund", the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510, 42 U.S.C. §9601 *et seq.*) (Superfund). The national response effort addressed by this federal legislation, including the payment of costs of government response to hazardous waste discharges and costs incurred in compensating certain losses resulting therefrom, is funded primarily by a tax imposed on crude oil and

petroleum products and on certain chemicals, which tax is currently being paid by plaintiffs.

In order to prevent duplicative taxation of the petroleum and chemical industries for the same purposes, §114(c) of Superfund, 42 U.S.C. §9614(c), expressly preempts a state from taxing any person to cover claims, costs or damages which may be compensated under the federal act. Section 114(c) of the federal act, effective as of December 11, 1980, states as follows:

> "Except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparation for the response to a release of hazardous substances which affects such State."

Since the mid-1970's the State of New Jersey has had in effect a Spill Compensation and Control Act (N.J.S. 58:10-23.11, *et seq.*) (New Jersey Act). The New Jersey Act prohibits the discharge of petroleum and other hazardous substances in the State of New Jersey and, in addition, provides for the clean-up and removal of such discharges, the establishment of a Spill Compensation Fund, and the raising of revenue therefor by the levy of a tax upon each and every operator of a major facility involving chemical and petroleum products in New Jersey. From the inception of the Fund, 93% of the revenues collected were spent on claims relating to the clean-up and containment of hazardous substances other than petroleum. The New Jersey Act, therefore, requires op-

erators of major facilities, including plaintiffs, to contribute to a fund, the principal purpose of which is to pay compensation or claims for the costs of response or damages or claims which may be compensated under the federal law. The continuation of this requirement after the enactment of Superfund is, therefore, a clear violation of the rights and immunities granted to plaintiffs as taxpayers under §114(c) of Superfund.

On May 12, 1981, Exxon Corporation, the BFGoodrich Company and Union Carbide Corporation filed a complaint in the United States District Court for the District of New Jersey seeking a declaratory judgment that they were protected by §114(c) of Superfund from the collection of taxes imposed by the New Jersey Act. On May 29, 1981, an Amended Complaint was filed, adding Monsanto Company and Tenneco Chemicals, Inc. as plaintiffs. All five plaintiffs are national companies operating major petroleum and/or chemical facilities in the State of New Jersey.[1]

This action was brought by plaintiffs in the District Court of the District of New Jersey because §113(b) of Superfund, 42 U.S.C. §9613(b), expressly vests original exclusive jurisdiction over all cases arising under Superfund in the federal district court.[2] New Jersey moved to

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1. In accordance with the requirements of Rule 28.1, a listing naming the parent companies, subsidiaries and affiliates of Petitioner corporations appears as Appendix A.

2. On April 21, 1981, the State of New Jersey, stating it was uncertain as to the scope of preemption under §114(c), filed a lawsuit against the EPA and other government officials in the District Court for the District of Columbia seeking a declaratory judgment as to the scope of §114(c). *State of New Jersey v. United States of America*, Civil Action No. 81-0945 D.D.C. 1981. This suit was dismissed on November 10, 1981, for lack of justiciability. On April 2, 1981, a similar suit had been filed by a New Jersey legislator in the District Court of New Jersey. *Lesniak v. United States of America*, Civil Action No. 81-977 (D.N.J. 1981). This case was later consolidated with *Merlino v. United States of America*, Civil Action No. 81-

dismiss the action on the basis that the complaint was barred by 28 U.S.C. §1341. In an oral opinion rendered on July 20, 1981, Judge Meanor dismissed plaintiffs' complaint. While specifically finding that the plaintiffs' complaint arose under the federal Superfund Act, the Court determined that the language of 28 U.S.C. §1341 controlled over the language of §113(b) of Superfund, based on the application of the rule of statutory construction that where general and specific statutes apply to the same subject matter, the specific statute controls.

At Judge Meanor's urging, plaintiffs filed an expedited appeal of his decision in the United States Court of Appeals and at the same time, filed a complaint in the Tax Court of New Jersey.[3] Oral argument was presented in the Court of Appeals on March 2, 1982. On June 7, 1982, the Court requested a rehearing on the issue of whether plaintiffs' Complaint presented a claim arising under a federal statute. Thereafter, on June 30, 1982, the Court of Appeals rendered a decision affirming the District Court's dismissal of the case, based on its determination that the plaintiffs' complaint did not present a claim "arising under" Superfund because plaintiffs' declaratory request sought to establish what was, in effect, a federal defense to a purely state law enforcement action.

1914 (D.N.J. 1981). On February 22, 1982, a Stipulation of Settlement was entered into between the parties and the District Court signed an Order of Dismissal of the case.

3. On cross-motions for summary judgment, the Tax Court, on April 23, 1982, granted the State defendants' motion and dismissed all but two counts of plaintiffs' consolidated complaints. The remaining two counts were severed from the rest of the case for purposes of appeal and the decision of the Tax Court was appealed to the Superior Court of New Jersey, Appellate Division on May 7, 1982.

During the pendency of this litigation, plaintiffs have been paying the applicable federal tax on their covered products. In addition, plaintiffs have continued to pay into the New Jersey Spill Compensation Fund in accordance with its terms, since failure to pay into the Fund constitutes a misdemeanor. In the event of nonpayment of taxes, the Director of the Division of Taxation (Director) may, pursuant to *N.J.S.* 58:10-23.11h(a), summarily and unilaterally halt the release of a taxpayer's product and seize, sell or otherwise dispose of a taxpayer's product to satisfy any tax liability. Because of plaintiffs' continued compliance with the provisions of the New Jersey Act, there never has been any pending or threatened State action against plaintiffs. The position of the Director, however, is that the New Jersey tax is not preempted by the federal statute, as plainly indicated by an official Treasury Department release in the CCH Tax Report. (Appendix E).

Existence of Jurisdiction Below

The District Court for the District of New Jersey had jurisdiction over this suit under 42 U.S.C. §9613(b).

REASONS FOR GRANTING PETITION

This petition raises fundamental questions of access to the federal courts by declaratory claimants attempting to vindicate federally created rights. The decision of the Circuit Court below should be reviewed in order to clarify the issues of federal question jurisdiction left in doubt by interpretations of this Court's decision in *Public Service Comm'n. of Utah v. Wycoff Co.*, 344 U.S. 237 (1952). There now exists a clear division among the circuits as to how the standard for federal question jurisdiction which was set forth in the dictum of *Wycoff*, should be applied to a request for declaratory relief. The interpretation of *Wycoff* adopted by the Third Circuit in its decision below severely constricts the jurisdiction of the federal courts and contravenes a significant purpose of the federal declaratory judgment procedure. This interpretation, adopted as well by the Fourth, Sixth, Eighth and Tenth Circuits,[4] is in direct and explicit conflict with the interpretation of *Wycoff* now applied in the First, Fifth, Seventh and Ninth Circuits,[5] engendering confusion and divergent results throughout the federal courts which can only be resolved by this Court.[6]

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4. *See McCorkle v. First Pennsylvania Bkg. & Trust Co.*, 459 F.2d 243 (4th Cir. 1972); *Michigan Sav. & Loan League v. Francis*, 683 F.2d 957 (6th Cir. 1982); *Lawrence Cty., S.D. v. South Dakota*, 668 F.2d 27 (8th Cir. 1982); *Madsen v. Prudential Fed. Sav. & Loan Ass'n.*, 635 F.2d 797 (10th Cir. 1981), *cert. denied*, 451 U.S. 1018 (1981).

5. *See First Fed. S. & L. Ass'n. of Boston v. Greenwald*, 591 F.2d 417 (1st Cir. 1979); *Braniff Internat'l., Inc. v. Florida P.S.C.*, 576 F.2d 1100 (5th Cir. 1978); *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982); *Conference of Fed. S. & L. Ass'ns. v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd sub nom Stein v. Conference of Fed. S. & L. Ass'ns.*, 445 U.S. 921 (1980). In addition, the Fifth Circuit's decision in the *Braniff* case, *supra*, is binding as the law of the Eleventh Circuit, under the authority of *Bonner v. City of Richmond*, 661 F.2d 1206 (11th Cir. 1981).

6. For analysis of the confusion in rationale and results now reigning among the circuits as a result of *Wycoff*, and suggestions as

results throughout the federal courts which can only be resolved by this Court.[6]

An analysis of the specific facts and actual holding of *Wycoff* makes clear the scope of its intended application. Plaintiff in *Wycoff* requested a declaratory judgment that its operations were within the stream of interstate commerce and, thereby, outside the scope of the state's regulatory authority.[7] In analyzing this request, the United States Supreme Court initially set forth the test by which the justiciability of a request for declaratory relief should be measured, quoting from the earlier case of *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937):

> " 'The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' The relief is available only for a 'concrete case admitting of an immediate and definite determination of the legal rights of the parties.' *Id.* at 240-241." *Public Service Comm'n. v. Wycoff, supra* at 243.

The Supreme Court found these factors to be missing in the plaintiff's complaint in *Wycoff*. First, the Court found that it had before it no evidence of pending or threatened state administrative action against plaintiff and since it was unclear what action, if any, the state

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to its resolution, see *Waldman, Federal Jurisdiction Over Declaratory Suits Challenging State Action*, 79 Columbia L. Rev. 983 (June 1979).

7. The plaintiff in *Wycoff* also requested injunctive relief, which the Court denied for lack of proof of immediate and irreparable harm.

would take, the suit for declaratory judgment was neither ripe nor concrete. As a result, plaintiff's request for declaratory relief was held to be premature, brought only to guard plaintiff against the possibility that the Utah Commission would, in the future, attempt to prevent or regulate its operations in some indeterminate manner. So finding, the Court concluded:

> "The carrier's idea seems to be that it can now establish the major premise of an exemption, not as an incident of any present declaration of any specific right or immunity, but to hold in readiness for use should the Commission at any future time attempt to apply any part of a complicated regulatory statute to it. If there is any more definite or contemporaneous purpose to this case, neither this record nor the briefs make it clear to us." *Id.* at 245.

The Court also noted the declaratory procedure initiated by plaintiff, which was not to protect against any immediate invasion of his rights but to obtain preliminary findings in anticipation of future state regulation, could not be used to preempt and prejudge issues committed for initial decision to a state administrative body. For these reasons, the Court held that the plaintiff's complaint in *Wycoff* lacked justiciability.

The case now on appeal arose in a factual context completely dissimilar from *Wycoff*. There is, undisputedly, a definite and concrete controversy between the parties regarding the interpretation of §114(c) of the federal Superfund Act, which affects their legal interests and is capable of specific relief of a conclusive nature. Plaintiffs have alleged in their complaint that §114(c) grants them a right protecting them from being required to contribute to a New Jersey fund the purpose of which is to pay compensation for claims which "may be compensated" under the federal Superfund Act. Plaintiffs

further allege that New Jersey's continued collection of tax revenues under the New Jersey Act is in direct violation of §114(c). New Jersey, on the other hand, has clearly enunciated an interpretation of §114(c) supporting its position that New Jersey's spill tax is not preempted by federal law, except to the extent that the federal statute preempts the State from collecting a tax the purpose of which is to pay for claims which have been *actually paid* by the federal government. The state has taken direct action in this regard by continuing to levy and collect the disputed tax from plaintiffs. If plaintiffs' position is correct, §114(c) precludes the State from subjecting plaintiffs to the New Jersey spill tax as it is now constituted. If the State is correct, it can continue to assess the tax as it has in the past for purposes which include payment of claims and damages which may also be compensated under the federal Superfund Act.

It is evident, therefore, that there exists an actual and substantial controversy between the parties of sufficient immediacy and reality to warrant declaratory relief.

In fact, the issue of justiciability has never been contested in this case. Instead, the Third Circuit below, *sua sponte*, looked to the paragraph of dictum following the actual holding in *Wycoff* as the basis for its decision denying jurisdiction in this case. In that dictum, the Supreme Court suggested that even had there been a pending or threatened state regulatory action against plaintiff to which plaintiff's declaratory judgment action was seeking to establish a federal defense, the Court would have had to look to the nature of the pending or threatened action in order to determine if federal question jurisdiction was present. The Court then stated:

> "If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a

claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." Id. at 248.

This language has spawned a line of circuit court cases articulating conflicting interpretations of federal jurisdiction. Numerous federal courts have cited the above-quoted language of *Wycoff* as a limitation on their jurisdiction, applying this dictum to preclude federal jurisdiction of declaratory actions that raise federal constitutional challenges to state enforcement of state law, whether or not coercive action has actually been initiated against the declaratory plaintiffs in state court. Other courts have expressly rejected this reasoning, holding that the possibility that the declaratory plaintiff's constitutional claim is or may be a defense to state coercive action is not, in itself, a limitation upon the power of the federal courts to entertain the controversy.

As a concrete example of this conflict, on July 13th of this year, two weeks after the Third Circuit decided the case of *Exxon Corp. v. Hunt*, 683 F.2d 69 (3d Cir. 1982), the Seventh Circuit rendered its decision in *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982). In that case, the Seventh Circuit expressly disapproved of the kind of application of *Wycoff* used in *Exxon Corp. v. Hunt*. Instead, the Seventh Circuit held there to be federal jurisdiction over a preemption challenge to the Illinois Spent Fuel Act which was filed in a federal court

prior to the initiation of a state court action against the declaratory plaintiffs.

The clearest example of the conflict between the circuit courts over the application of *Wycoff* has arisen in recent cases involving preemption challenges to state statutes by federal savings and loan associations. The Sixth Circuit, in *Michigan Sav. & Loan League v. Francis*, 683 F.2d 957 (6th Cir. 1982), held that federal savings and loan associations' declaratory judgment claim that Michigan's anti-redlining statute was preempted by federal law was, in reality, a defense to a threatened enforcement of state law and, therefore, the federal court lacked federal question jurisdiction to hear the claim. A month later, in August of this year, the Sixth Circuit reaffirmed its *Francis* holding in *First Fed. S. & L. of Detroit v. Detroit Bond & Mortgage Investm. Co.*, Civil Action Nos. 80-1737, 80-1748, 80-1754, slip. op. (6th Cir. Aug. 25, 1982). See also, *Home Fed. S. & L. Ass'n. of Iowa v. Ins. Dept. of Iowa*, 571 F.2d 423 (8th Cir. 1978). These decisions are in direct and irreconcilable conflict with the Ninth Circuit's holding in *Conference of Fed. S. & L. Ass'ns. v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd sub nom*, *Stein v. Conference of Fed. S. & L. Ass'ns.*, 445 U.S. 921 (1980), wherein, in exactly the same factual context, that court rejected a *Wycoff*-based challenge to federal jurisdiction and permitted the case to be litigated in federal court. See also *First Fed. S. & L. Ass'n. of Boston v. Greenwald*, 591 F.2d 417, 423 n. 8 (1st Cir. 1979).[8]

Direct conflict between the circuits is further evident in two suits which challenged the constitutionality

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8. *Madsen v. Prudential Fed. Sav. & Loan Ass'n.*, *supra*, a declaratory judgment suit challenging a state bank's policy regarding paying interest on escrowed funds, is actually distinguishable from these cases. In *Madsen*, the Court did not disapprove of the reasoning of *Stein*, but attempted to reconcile *Stein* by pointing out that

of state statutory schemes regulating interstate air carriers as violative of the Supremacy Clause. The Third Circuit, in *Allegheny Airlines, Inc. v. Pennsylvania P.U.C.*, 465 F.2d 237 (3d Cir. 1972) *cert. denied* 410 U.S. 943 (1973) held the plaintiff's suit to be solely a federal defense to a state regulatory action and, therefore, not properly within the federal court's jurisdiction,[9] while the Fifth Circuit, in *Braniff Internat'l., Inc. v. Florida P.S.C.*, 576 F.2d 1100 (5th Cir. 1978), found that the fact that plaintiff's constitutional claim *could be* a defense to a state regulatory action did not limit the power of the federal court to entertain the controversy before it.

In other areas, the Eighth Circuit, in *Lawrence Cty., S.D. v. South Dakota*, 668 F.2d 27 (8th Cir. 1982), has held that even in the absence of a threatened or pending state enforcement action, a preemption challenge to restrictions placed on the expenditure of federal entitlement funds by state regulation did not "arise under" federal law but was merely an anticipated defense to some possible state action. This reasoning cannot be reconciled with the decision of the Ninth Circuit in *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975) *aff'd sub. nom., Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), *reh'g denied* 431 U.S. 925 (1977) wherein a preemption challenge to state statutes pertaining to the accuracy of weight statements on meat package labels,

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under the facts of the case before it, there was no direct conflict between the state and federal regulations concerning payment on escrowed funds. Such conflict was present in *Stein* and, of course, is present in this matter in the conflict between §114(c) of Super Fund and the New Jersey Act.

9. The Third Circuit in *Allegheny Airlines*, by way of dictum, suggested that had the airline in that case sought declaratory relief before discontinuing its air service in violation of state regulations, the federal court would have entertained the case. 465 F.2d at 243.

filed after the institution of state court action against the federal plaintiff, was held to be a viable and independent federal controversy over which the federal court had jurisdiction under 28 U.S.C. §1331.

Clearly, then, confusion reigns among the circuits as to the intended scope and application of the *Wycoff* dictum, resulting in conflicting decisions regarding access to the federal courts, even as to identically-situated claimants.

It is suggested that the most reasonable interpretation of the "test" in *Wycoff* is that the Court intended it to foreclose the possibility that the declaratory judgment procedure would be used to circumvent the established limitations on the removal jurisdiction of the federal courts, i.e., a defendant may not defeat a plaintiff's choice of a state court forum by removal of the complaint to the federal court unless a federal question appears *on the face* of the plaintiff's complaint. Removal jurisdiction, therefore, cannot be created by a defendant by raising a federal *defense* to a claim based in state law. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908); *La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339 (3d Cir. 1974), *cert. denied sub nom. Alligator Co. v. La Chemise Lacoste*, 421 U.S. 937 (1975) *reh'g denied* 421 U.S. 1006 (1975). Thus, if while a state action is threatened or pending, the defendant files a declaratory judgment action in federal court seeking relief which is a defense to the state action, such declaratory judgment action must be closely scrutinized by the court to determine if federal jurisdiction is present. Where the issue raised by the declaratory plaintiff is, in essence, an anticipatory or reiterated defense to the threatened or pending state action, which merely touches upon federal law, federal jurisdiction would not attach. If, however, an examination discloses that the declaratory plaintiff is asserting a right created by federal law, the vindication of

which rests upon the interpretation of federal law, and the declaratory complaint in and of itself is a viable cause of action, then federal jurisdiction would exist. *Rath Packing Co. v. Becker, supra* 530 F.2d at 1305-6; *Illinois v. General Elec. Co.*, 683 F.2d at 211.

Although the Third Circuit relied upon *Wycoff* in affirming the dismissal of the instant case, an examination of the declaratory request in this suit discloses that plaintiffs' complaint is in no way a device to circumvent state court jurisdiction or the limitations on removal. The *Wycoff* rationale, therefore, is inapplicable. Simply, there is not now, nor has there ever been, a pending, threatened or even contemplated enforcement action as against plaintiffs by the State of New Jersey. In fact, at the very time that plaintiffs' complaint was being filed in the District of New Jersey, the State of New Jersey was in federal court in the District of Columbia seeking a federal interpretation of §114(c) of Superfund.

On its face, plaintiffs' complaint fully satisfies the test for federal question jurisdiction set forth in *Gully v. First Nat. Bank*, 299 U.S. 109 (1936). The essential element of plaintiffs' cause of action is the allegation of a right arising under 42 U.S.C. §9614. There is a genuine and concrete controversy existing between the parties with reference to the construction of this statutory provision. Finally, this controversy is disclosed upon the face of plaintiffs' complaint, unaided by the State's answer or by any petition for removal.

Given the presence of federal jurisdiction in this case, plaintiffs' choice to proceed in a federal forum under the Declaratory Judgment Act, 28 U.S.C. §2201, asserting an independent claim based upon the Supremacy Clause and directly implicating §114(c) of Superfund, should be accorded due respect by the judiciary. *Zwickler v. Koota*, 389 U.S. 241 (1967).

In theory, plaintiffs could have attempted to initiate a state court proceeding by refusing to pay the applicable New Jersey Spill tax. Under the statutory scheme enacted by the State, however, this would have exposed plaintiffs and their employees to criminal charges, as well as monetary interest and penalties and possible ex parte seizure and sale of their goods by the Director of the Division of Taxation. This cannot be deemed to be a remedy for plaintiffs, however. *Georgia R. & Bkg Co. v. Redwine*, 342 U.S. 299, 303 n.11 (1952). In no way should the *Wycoff* dictum be expanded to overturn the long-established principle that a plaintiff is not required to violate a law he deems unconstitutional in order to obtain a hearing of his case. *Ex Parte Young*, 209 U.S. 123 (1908). As the most recent circuit court to address the issue has held:

> ". . . if [the dictum in Wycoff is] understood to require federal claimants always to litigate their claims as defenses in state court if they can, it must be wrong, and though lower federal courts have followed it from time to time the Supreme Court has not. . . . Since the impending state action will almost always be based on state law alone, the dictum, read broadly, would overrule *Ex Parte Young* and every case that has ever followed it." *Illinois v. General Electric Co.*, 683 F.2d at 211.

In conclusion, it states a mere truism to say that plaintiffs' claim under §114(c) could be raised as a defense to some state court action. The same could be said for most declaratory judgment claims which attempt to vindicate a federally-created right or immunity, including requests for declaratory relief based on claims of freedom of speech, privacy, assembly and religion. See *Zwickler v. Koota, supra; Steffel v. Thompson*, 415 U.S. 452 (1974). It should be irrelevant that plaintiff's federal preemption challenge might be asserted as a defense to a

hypothetical state-initiated enforcement action. For jurisdictional purposes, plaintiffs' affirmative claim "arises under" §114(c) of Super Fund.

Finding that plaintiffs' suit in *Exxon Corp. v. Hunt* "arises under" federal law, i.e. §114(c) of the federal Superfund Act, triggers the exclusive jurisdiction provision of §113(b) of Superfund, requiring that the case be heard in federal court.

There is sound legislative reasoning behind this unqualified choice of a federal forum for cases arising under Superfund. Superfund represents an attempt by Congress to respond in a coordinated, efficient and effective manner to the substantial national problem of the pollution of the environment by the release of hazardous substances. Given the scope of this legislation, the purpose of the exclusive jurisdiction provision in the statute is clear: to insure orderly administration and uniform interpretation of Superfund. Its purpose is to avoid fifty potentially divergent interpretations of any provision of Superfund. In this case, plaintiffs are national corporations, paying taxes in several states. If the issues raised in plaintiffs' complaint are permitted to be decided in state tax courts throughout the nation, plaintiffs could be paying taxes under as many different interpretations of §114(c) as there are state taxing statutes.

Despite the clear language of §113(b) and the strong legislative reasons behind it, the District Court below dismissed plaintiffs' complaint on the basis that 28 U.S.C. §1341, the Tax Injunction Act, conflicted with, and prevailed over, §113(b) of Superfund and, therefore, required the case to be heard in State Court.

A principal maxim of statutory construction demands that where two statutes deal with the same subject, every attempt must be made to construe them so that they are consistent with each other, as by this means

Congressional intent can be given its fullest expression. *Get Oil Out, Inc. v. Exxon Corp.*, 586 F.2d 726 (9th Cir. 1978); 2A A. Sutherland, *Statutory Construction*, §51.05 (4th Ed. 1973). Only when two statutes are in irreconcilable conflict may the statutory construction rule that a specific statute controls over a more general one be considered at all. *Panama Canal Co. v. Compania Nacional De Nav.*, 463 F. Supp. 330, 333 (D. Canal Zone 1978).

It is respectfully submitted that §113(b) and 28 U.S.C. §1341 can be harmonized so as to give full effect to the clear language and Congressional intent behind each.

28 U.S.C. §1341 is a statute of conditional application—it applies *only if* there is a plain, speedy and efficient remedy in state court. The statute was enacted because Congress became concerned about the practice of large out-of-state corporations using diversity jurisdiction to litigate the validity of state taxes in federal courts, a practice which gave them an advantage over state citizens who generally, under state law, had to pay the tax and then sue for a refund. The purpose of 28 U.S.C. §1341 was to eliminate this unfair advantage of foreign corporations over citizens of the state and to eliminate the ability of foreign corporations to withhold payment of local taxes and thereby to disrupt local financing. *Garrett v. Bamford*, 538 F.2d 63, 66 (3d Cir. 1976), *cert. denied sub nom. Bamford v. Garrett*, 429 U.S. 977 (1976).

On the other hand, §113(b) of Superfund is an unconditional jurisdictional statute specifically applicable to cases arising under Superfund. It was Congress's clear intent in §113(b) that, except for enumerated exceptions, a litigant's sole forum for institution of an action to interpret Superfund was to be in the federal district court.

The two statutes can be reconciled by recognizing that when Congress placed original exclusive jurisdiction in the federal district courts over any controversy arising under Superfund, it intended that a state remedy be no longer available to a party. If a state remedy is not available to a party litigant, the condition of §1341 has not been met and the statute is, therefore, in applicable.

Such a harmonizing construction of §113(b) of Superfund and §1341 does not distort the language or intent of either statute. It simply recognizes that when an action challenging a state tax is instituted under a statute which vests exclusive jurisdiction of such a suit in the federal courts, §1341's conditional directive does not apply. *Board of Directors of St. Francis Levee Dist. v. Kurn*, 98 F.2d 394 (8th Cir. 1938), *cert. denied*, 305 U.S. 647 (1938); *National Carriers' Conference Comm. v. Heffernan*, 440 F. Supp. 1280 (D. Conn. 1977); *Lyford v. City of New York*, 137 F.2d 782, 787 (2d Cir. 1943). This result is consistent with the rule that if two statutes cannot be reconciled, the later enacted statute (in this case, Superfund) governs. *Panama Canal Co. v. Compania Nacional De Nav.*, 463 F. Supp. at 334.

Finally, it is contended that even if a reconcilation of the two statutes is not possible, §113(b), as the specific jurisdictional provision applicable to controversies arising under Superfund, should prevail over 28 U.S.C. §1341, which deals generally with the jurisdiction of challenges made to all manner of state taxing statutes. *Cf. Hess v. Gray*, 85 F.R.D. 15, 20 (N.D. Ill. 1979).

The reasonable legislative intent of §113 is that all cases, except those enumerated in the section as exceptions, be decided by federal district courts. The areas which Congress did not want brought in the federal district courts under the original exclusive jurisdiction provision of §113(b) were excluded in §113(a) and

§113(c). Nowhere did Congress provide an exception for interpretation of the preemption provision of §114(c) which would preclude the imposition of certain state taxes, and none should now be inferred by the courts. This interpretation accords with the rule of statutory construction that where Congress explicitly enumerates exceptions to the operation of a statutory provision, additional exceptions are not to be inferred in the absence of evidence of a contrary legislative intent. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); 2A Sutherland, §47.12 at p. 123, *supra* at 17.

CONCLUSION

The concern of the Supreme Court in *Wycoff* was "that a plaintiff not be allowed, by asserting a defense to impending or threatened state action to proceed under the fountainhead of federal court jurisdiction in a case which otherwise could not be heard in federal court." *Braniff Internat'l, Inc. v. Florida P.S.C.*, 576 F.2d at 1105. That original purpose, however, has become submerged in a semantic quagmire, in which different federal courts look at nearly identical pleadings in separate cases, one court concluding that the pleadings state a federal question, another that the pleadings state merely a defense to a state law question. The confusion among the circuits demonstrates the need for a clarification by this Court of the principle behind the *Wycoff* dictum, and for the enunciation by this Court of a workable test for applying that principle.

In addition, the determination as to whether the interpretation of §114(c) of Superfund should be relegated to a State tax court by the operation of the Tax Injunction Act is a significant question of federal law which should be decided by this court.

Respectfully submitted,

JOHN J. CARLIN, JR.,
Counsel of Record for Petitioners

FARRELL, CURTIS, CARLIN & DAVIDSON
Attorneys for Petitioners, Exxon Corporation, The BFGoodrich Company, Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc.

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